IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7487 OF 2004

Castrol India Limited, having its registered office at Technopolis Knowledge Park, P.O.Box No.19411, Mahakali Caves Road, Chakala, Andheri (East), Mumbai - 400 093. .. Petitioners (Org.Defendants)

Vs.

M/s.Bharat Petroleum Corporation Ltd., a Statutory Corporation incorporated under the Indian Company's Act, formerly known as Burmah Shell Oil Storage & Distributing Co.of India Ltd. natinoalised by the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 and thereafter known as Burmah Shell Refineries Ltd., and thereafter Bharat Refineries Ltd. having their registered office at Bharat Bhavan, 4 & 6 Currimbhoy Road, Mumbai - 400 001. .. Respondents (Org.Plaintiffs)

--

Shri V.A.Thorat, Senior Counsel with Shri A.H.Palekar i/b M/s.Dalal & Co. for the petitioners.

Shri S.G.Page with Shri S.R.Page for the respondents.

--

CORAM : R.M.S.KHANDEPARKAR, J

DATED : 19th OCTOBER, 2004.

ORAL JUDGMENT :

1. Heard. Rule. By consent, the rule is made returnable forthwith.

2. The petitioners challenge the order dated 7th July, 2004 passed by the Small Causes Court, Mumbai, in Misc. Notice No.268 of 2003 allowing the respondents to amend the claim for mesne profit. The ground of challenge is that by virtue of the amendment the respondents are seeking to claim mesne profit for the period prior to the filing of the suit as also the claim which is ex facie barred by law of limitation.

3. The learned Senior Counsel appearing for the petitioners while challenging the impugned order sought to rely upon the decision of the Supreme Court in the matter of **Mohd. Amin & Ors. v. Vakil Ahmed & Ors.,** reported in AIR 1952 SC 358 as well as the order passed by the lower appellate court in the Appeal arising from the decree in the suit and has submitted that while disposing the appeal, consequent to the delivery of possession of the premises during the pendency of the appeal, the lower appellate Court

had granted liberty to the respondents/plaintiffs to file an application for mesne profit under Order 20 Rule 12(1)(c) of the Code of Civil Procedure. He has further submitted that even at the time when the suit was filed, the specific prayer as regards the mesne profit was made to the effect that the respondents are entitled for recovery of mesne profit from the date of the institution of the suit till the date of recovery of possession of the premises. Considering the same, according to the learned counsel, the trial Court erred in allowing the respondents to include the claim for mesne profit prior to the date of the institution of the suit as well as the one which was barred by law of limitation.

4. The learned advocate for the respondents, on the other hand, placing reliance in the decisions in the matter of **Ragu Thilak D.John v. S.Rayappan & Ors.,** reported in AIR 2001 SC 699, **Mudra Salt & Chemical Industries v. Collector, Thane & Ors.,** reported in (2001) 3 Mh.L.J. 151 and **Shaikh yasin Sayidullah v. Kasim Abu Hussein & Anr.,** reported in 2004(3) All MR 346, has submitted that the issue of limitation can very well be gone into at the time of disposal of the application in relation to the mesne profit on merits, and it is too premature for the

petitioners to raise the issue of limitation and seek interference in the impugned order. He has further submitted that the order passed by the lower appellate court disposing of the appeal has been clearly endorsed the right of the respondents to claim mesne profit and being so, there is no case for interference in the impugned order, at this stage, in writ jurisdiction.

5. Undoubtedly, the respondents/plaintiffs in the plaint have claimed the mesne profit from the date of the institution of the suit till the date of the recovery of the vacant possession of the premises by the petitioners. It is also pertinent to note that while justifying the eviction of the petitioners from the suit premises, in the pleadings itself, the respondents had stated that the tenancy in favour of the petitioners was brought to an end by the notice dated 14th January, 1978. The suit was filed in the year 1978. The judgment and decree was passed on 18th April, 2002 by the lower appellate Court in the Appeal No.75 of 2000 arising from the final decree dated 26th August, 1999 passed by the trial court in LE&C Suit No.300/410 of 1978. The lower appellate court granted the liberty to the respondents-plaintiffs to make application for mesne profit under Order 20 Rule

12(1)(c) of the Code of Civil Procedure. Undisputedly, the trial Court by the impugned order has allowed the amendment which includes the claim for mesne profit from 23rd July, 1968 to 31st December, 1991 and further from year to year, not only after filing of the suit but even also from year to year prior to the date of filing of the suit. The amendment also includes the claim in relation to the service charges as well as the municipal taxes from 1968-69 to 30th October, 2000. It is also not in dispute that the lower appellate Court's order was sought to be challenged before this Court by way of writ petition No.3032 of 2000 which came to be rejected on 24th November, 2003, after hearing both the parties.

6. Once it is apparent that the respondents while filing the suit had claimed mesne profit from the date of the suit i.e. from 1978 and further while disposing the appeal, liberty was granted to the respondents-plaintiffs to file an application for mesne profit under Order 20 Rule 12(1)(c) of the Code of Civil Procedure which obviously relates to the entitlement for mesne profit from the date of the institution of the suit, certainly the trial court could not have allowed the amendment to the

application for mesne profit permitting to introduce the claim for mesne profit for the period prior to the institution of the suit, apart from the fact that most of the period for which the claim was sought to be introduced by way of amendment was barred by law of limitation, as rightly submitted by the learned advocate for the petitioners.

7. It is not merely a question of limitation as such but the issue relates to the matter pertaining to the entitlement of the respondents to claim such mesne profit. Once in the proceedings between the parties, it has been pronounced by the lower appellate Court that the respondents would be entitled to claim mesne profit in terms of Order 20 Rule 12(1)(c) of the Code of Civil Procedure from the date of filing of the suit and that having been not disturbed by this Court while rejecting the writ petition filed against the said judgment, the issue as regards the entitlement to claim mesne profit merely from the date of the institution of the suit had stood concluded between the parties and it was not permissible for the trial Court to allow the respondents to introduce the claim as regards the mesne profit prior to the date of the institution of the suit. The Apex Court in **Mohd. Amin's case (supra)** had clearly rejected the

contention that even though there was no demand for mesne profit for the period prior to the institution of the suit, such claim would have to be considered while deciding the rights of the parties in respect thereof including the mesne profit and it was held that no mesne profit can be granted, unless it is specifically pleaded in the plaint. In fact, it was held that "the learned Solicitor-General appearing for the plaintiffs conceded that there was no demand for mesne profits as such but urged that the claim for mesne profits would be included within the expression "awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto." We are afraid that the claim for mesne profits cannot be included within this expression and the High Court was in error in awarding to the plaintiffs mesne profits though they had not been claimed in the plaint." Undoubtedly, the respondents herein had claimed the mesne profit specifically from the date of the institution of the suit. Besides as already observed above, the lower appellate court had permitted the respondents to claim such mesne profit from the date of institution of the suit. Being so, bearing in mind the decisions of the Apex Court and the liberty granted to the respondents, the trial court would not have allowed the amendment relating to

the mesne profit for the period prior to the date of the institution of the suit.

8. The contention that the point of limitation can be decided while dealing with the application for mesne profit on merits, is devoid of substance as it is not a mere issue of limitation but it relates to the question of entitlement of the respondents to claim mesne profit and such right being available in the facts and circumstances of the case from the date of the institution of the suit, and not prior to that day, the said issue being already concluded in the order passed by the lower appellate court, the decision of the Apex Court in **Ragu Thilak's case (supra)** has no application to the facts of the case in hand. Similarly, the decisions in **Mudra Salt's case (supra)** as well as **Shaikh Sayidullah's case (supra)** are also of no help to the petitioners to justify the impugned order. In **Mudra Salt's case (supra),** the amendment was sought for introducing the alternative plea based on adversed possession whereas in **Shaikh Sayidullah's case (supra),** it was ruled that the amendment was proposed to be made in a situation where cause of action revealed to be continuing one. Apparently, on the facts as well as on the point of law as discussed in the aforesaid two decisions, both

have no application to the matter in issue and are of no help to justify the impugned order.

9. For the reasons stated therefore the impugned order cannot be sustained and is liable to be quashed and set aside to the extent it allows amendment for the period prior to the date of the institution of the suit without affecting the impugned order in any manner in relation to the period from the date of the institution of the suit. Hence, the impugned order needs to be modified accordingly.

10. In the circumstances, the impugned order allowing the amendment needs to be modified and the amendment to the application claiming mesne profit shall stand allowed to the extent it relates to the period from the date of the institution of the suit is allowed and the application for amendment in relation to the period prior to the date of the institution of the suit shall stand rejected.

11. At this stage, the learned advocate for the petitioners prays for time to file reply to the amended application. The learned advocate for the respondents states that the petitioners had failed to file reply even to the original application itself.

However, the learned advocates for both the parties have not been able to confirm whether there is any order to proceed ex parte in the matter against the petitioners. In any case, it is apparent that the application for amendment was heard and disposed of, it obviously discloses that there was no such order to proceed ex parte against the petitioners, and therefore, the petitioners need to be given time to file reply to the amended pleadings. However, the petitioners are at liberty to file written statement to the amended pleadings within a period of four weeks from today.

12. The petition therefore partly succeeds. The impugned order is modified as stated in paragraph 10 above. Accordingly, the rule is made absolute in above terms with no order as to costs. Needless to say that the matter to be disposed of as expeditiously as possible subject to co-operation to be rendered by both the parties to the proceedings before the trial Court.

13. Certified copy be expedited.